

Acquisition Advisory Panel

Initial Working Group Issues

February 28, 2005

Commercial Practices/Commercial Items Working Group

1. Does the definition of “commercial item” at FAR 2.101 need to be clarified?

For example:

- What is the definition of a minor modification? If an item is commercially produced, but modified for use in a government mission – is the item still “commercial?”
- What is the definition of an item customarily used by the “general public” or by “non-governmental” entities for purposes “other than governmental purposes?” Does that include items used by the general public, but sold to state and local entities? Does it include items sold to governmental entities acting in a proprietary manner? Does it include items sold to corporations that are partially or wholly state funded?

2. Who is responsible for determining whether an item offered under a subcontract is a commercial item? Once made, should that decision be second-guessed? Does the provision at DFARS 244.402, which provides that prime contractors “shall” determine whether a subcontract item is commercial, but reserves the right for the CO to make a different judgment pursuant to FAR 15.403-1(c)(3), need to be revised?

- What impact does the DFARS provision have on prime contractors’ willingness to use commercial item authority?
- Where prime contractors are designating subcontract items as “commercial,” what terms are included in the subcontracts regarding provision of cost and pricing data?

3. Section 1443 of the National Defense Authorization Act for 2004 amended the OFPP Act to add special emergency procurement authority for use by any executive agency for defense against or recovery from nuclear, chemical, biological or radiological attack against the United States. This authority allows the head of an agency to deem a procurement for these purposes as a “commercial item” (subject to certain restrictions on sole source awards).

Is it appropriate to “deem” items or services as “commercial” that do not otherwise qualify? If an exemption from CAS or TINA requirements is necessary, why not just authorize the exemption?

4. Potential issues for a presentation by commercial entities at the March and April Panel meetings:

- What is commercial practice regarding head-to-head competition for services contracts and task orders, including IT services and business process type services?
- What is commercial practice regarding use of firm-fixed price contracts or task orders for services contracts?
- What is commercial practice for use of time and materials or labor hours contracts?
- What is commercial practice regarding share-in-savings contracts?
- Do commercial companies use best value procurement? How do they determine best value?
- What processes/techniques do commercial companies use to establish requirements for services procurements?